November 16, 2004

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EX PARTE

Ms. Marlene H. Dortch, Secretary

Federal Communications Commission

445 12th Street, S.W.

Washington, D.C. 20554

Re: TRO Remand Docket Nos. 01-338, 04-313

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, Integra hereby submits the attached impairment analysis for inclusion in the record in the above captioned dockets.

Sincerely,

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251 Impairment Analysis: WC Docket No. 04-313, CC No. 01-338

I. Introduction

Integra Telecom is a facilities-based CLEC serving the small to medium sized business market (average customer has only 8 access lines) in the states of Oregon, Washington, Utah, Minnesota, and North Dakota. Integra has invested over $300 million in switches and other infrastructure. Even as a facilities-based carrier, Integra is completely dependent upon the loops and transport of Qwest and Verizon to serve its customer base. Integra filed Initial and Reply comments in this docket establishing that loops and transport are not available from alternative suppliers in Integra's market.

Products can only be removed from the UNE list when alternatives are available to requesting carriers. This is a defining principal of the Telecom Act in four key areas: loops, dark fiber transport, DS-3 transport, and pricing of 271 network elements.

The ILECs use Dark fiber in serving retail customers. Captive, monopoly ratepayers under rate of return regulation paid for most of this dark fiber. Captive ratepayers paid for this dark fiber during a time when ILEC's were guaranteed a return on investment, without any investment risk. If CLECs do not have access to dark fiber, ILECs have a crushing competitive advantage. ILECs should only be allowed to remove dark fiber from the 251 UNE list when the CLEC has reasonable competitive alternatives. Removing dark fiber as a UNE while allowing the ILEC to continue using it and not ensuring economically reasonable alternatives to CLECs is blatantly anti-competitive and runs counter to the Telecom Act. If an ILEC no longer leases dark fiber to CLECs, that dark fiber remains in the ground, unused. The only explanation for an ILEC decision to allow a product to remain unused rather than lease it to a competitor is one based in anti-competitive behavior: the ILEC would rather earn nothing on an asset paid for by captive rate-payers than facilitate competition. Anti-competitive behavior is the only explanation for the irrational act of consciously choosing to turn a revenue-generating asset into a non-revenue generating asset. This anti-competitive behavior should not be the policy of the FCC.

The FCC has already acknowledged the significant obstacles to CLECs self-deploying fiber. See TRO paragraph 381. If dark fiber is removed as a UNE, without CLEC alternatives, how will the FCC explain a reversal of these detailed, fact specific findings in a manner that avoids another reversal by the D.C. court? Integra supports dark fiber and DS-3 transport being subject to the tests described below. Neither Integra nor the law supports a complete elimination of dark fiber as a UNE without reasonable competitive alternatives.

ILECs have one provider of transport connecting all central offices. ILEC's have no need to deal with multiple service providers; do not have to determine which provider is responsible for maintenance or operational issues; do not have to compensate multiple

providers at multiple rates. Requiring CLECs to have multiple providers of transport connecting CLEC collocations is discriminatory and anti-competitive. The FCC has already recognized and acknowledged the difficulties, obstacles, and costs associated with multiple transport providers. See TRO paragraphs 381, 373. None of these difficulties has dissolved since the FCC made these specific findings in the TRO. How will the FCC explain a reversal of these detailed, fact-specific findings in a manner that avoids another reversal by the D.C. court?

Lastly, network elements removed from the 251 list as part of this proceeding might nonetheless be available to requesting carriers as network elements under 271. The FCC has already ordered that RBOCs have an independent obligation to make certain network elements available under 271. The Courts have upheld that decision. To complete the circle, the FCC must decide how 271 network elements will be priced. To date, the FCC has only said that those elements will be priced under the "just and reasonable" standards of sections 201 and 202 of the Communications Act. The FCC must go further and address how the prohibition against discriminatory pricing in section 202 of the Communications Act impacts the pricing of 271 elements. In USTA II, the Court noted that the FCC failed to consider the nondiscrimination prohibition.

All of these issues are addressed in more detail below.

II. Transport analytical framework

Integra Telecom supports the analytical framework of the Loop and Transport Coalition (L&TC) for DS-1, DS-3 and dark fiber transport, subject to some modifications and additions:

A. DS-1 transport: National finding of impairment.

Comment: Integra agrees with the L&TC. In the TRO, the FCC makes specific findings regarding the barriers to self-provisioning DS-1 transport, and all five commissioners conclude that impairment has been proven on a national basis. See paragraphs 325, 326. The FCC's findings regarding the barriers for self-provisioning of DS-1, DS-3 and dark fiber transport remain today. See TRO paragraphs 360, 370, 371, 373, 391, 386.

B. DS-3 and Dark Fiber transport:

1. Top 50 largest MSAs

The FCC should find non-impairment on routes between large urban central offices with the following characteristics: (1) the two end points of the route directly connect two ILEC central offices over the same distance as the ILEC transport in the same LATA in a top 50 MSA, (2) at least four self-provisioned fiber-based collocators have established operational collocations at both ends of the route, at least two of which self-certificate as a wholesale provider of transport to or from both end points, and (3) each of the end points serves a central office with at least 50,000 business loops (indicating a level of aggregate demand that makes wholesale service likely to exist).

Comment: Dark fiber and DS-3 transport must only be eliminated as UNEs when competitive alternatives are available to requesting carriers. This test ensures the availability of competitive alternatives, ensuring that requesting carriers and ILECs remain on a level playing field, with both having access to critical transport. Even with competitive alternatives, requesting carriers are significantly disadvantaged by having to use multiple transport providers when the ILEC has but one provider. The significance of these disadvantages are described by the FCC at length in the TRO, and the FCC will have to explain to the D.C. Circuit Court why it is ignoring those self-described barriers in this new analysis. With regard to the number of business lines in the central office, Integra makes a change from the L&TC framework. The focus should be on the number of loops, not access lines. Requesting carriers have no access to the data necessary to count access lines in a central office. Information of that type is exclusively the province of the ILEC. The transport test must not use a standard to which only one competitor is privy. Focusing on loops instead of access lines gives requesting carriers the opportunity to participate equally in the analysis, because loop count is available to requesting carriers via programs like Qwest's ICON database. Any ILECs that do not provide requesting carriers access to loop count information should be ordered to do so by the FCC.

Also, the test must focus on the presence of competitive alternatives, meaning multiple companies ready, willing, and able to lease their self-provisioned facilities at wholesale. The information necessary to analyze this test should first be exchanged between the ILEC and requesting carrier, with either party able to use the process described below in the event of a disagreement. The tests are intended to be self-executing between the ILEC and requesting carrier. This eliminates the need for the FCC to gather any particular data to analyze impairment, subject to the appeal process provided for below.

Dark fiber has been available for lease by CLECs at prices set by state commissions for eight years, the entire life of Integra. Integra's network design and business plan is built around the existence of dark fiber, just like the ILEC's built their network design and business plan around dark fiber. Integra has invested more than $6 million in the optronic equipment necessary to light dark fiber. As Integra captures more market share, it will have further incentive to leverage this investment by building more transport, including, ultimately its own fiber routes. On the other hand, these investments will be stranded if dark fiber is removed as a UNE.

Integra establishes impairment for dark fiber in its Initial and Reply comments. There is no evidence in the record disputing Integra's analysis. There is no legal basis for removing dark fiber from the UNE list absent the presence of reasonable competitive alternatives.

2. Small End Offices

The FCC should find impairment for all routes where at least one end point serves a central office with fewer than 25,000 business loops. For these routes, requesting carriers are not likely to have competitive alternatives to ILEC DS3 transport or dark fiber.

Comment: Integra agrees with the L&TC. These routes are highly unlikely to have any competitive alternatives to ILEC DS-3 and dark fiber transport. Therefore, a finding of impairment subject to appeal as provided below is appropriate. The importance of using loops instead of access lines is the same as described above.

3. All other routes

For routes not meeting either of these characteristics, meaning routes with central offices containing more than 25,000 business loops but fewer than 50,000 business loops, the FCC is not able to make an impairment finding without examining the extent of competitive deployment on a particular route. For these routes, the FCC should collect the information necessary to conduct a trigger analysis, although it may simplify application of the triggers in order to take into account the court's concerns. The FCC should find impairment on these routes unless (1) at least four self-provisioned fiber-based collocators ready, willing, and able to lease their fiber at wholesale have established active collocations at both ends of the route, and (2) at least two of these fiber-based collocators self-certificates as a wholesale provider of transport to or from both end points.

Comment: Integra makes some modifications and additions. The absence of impairment for a requesting carrier is established only when competitive alternatives exist. Integra suggests the same number of alternative providers in this test as above. Also, as above, the test must focus on the presence of competitive alternatives, meaning multiple companies ready, willing, and able to lease their self-provisioned facilities at wholesale. The information necessary to analyze this test should first be exchanged between the ILEC and requesting carrier, with either party able to use the process described below in the event of a disagreement.

C. Transition for routes where either DS-3 or dark fiber is removed from the 251 UNE list

Integra adds this issue to the L&TC analysis. A requesting carrier should be given a period of 12 months to make alternative arrangements following a determination that DS-3 or dark fiber is not available from the ILEC as a 251 UNE. Specifically, the ILEC must allow the requesting carrier to lease DS-3 or dark fiber transport for a period of 12 months following a determination of no impairment. After 12 months, the ILEC's obligation to provide DS-3 or dark fiber transport as an unbundled network element under section 251 ends unless the requesting carrier has filed a waiver request with the FCC. The ILEC's obligation to provide DS-3 or dark fiber transport continues until the waiver request is ruled on by the FCC. The waiver request should be granted in all cases where the requesting carrier's inability to find replacement transport within the transition period is due to lack of cooperation from the ILEC, natural impediments or restraints to deployment such as street cut moratoria or where the CLEC can certify that it has made a good faith effort to deploy facilities and for one or a combination of reasons deployment could not be completed in the allotted time frame.

D. Dispute resolution procedure

Integra adds this issue to the L&TC analysis. The above tests are intended to be self-executing between the ILEC and a requesting carrier. If the ILEC and requesting carrier cannot agree on the application or outcome of the test on a given route, either party may ask the FCC for a final determination. Such determinations should be made on an expedited basis to avoid creating unnecessary delays for CLECs in making arrangements to deliver service to existing and new customers. The Commission should dedicate the time of at least one attorney in the Market Disputes Resolution Division to handle such disputes on an informal basis, by conference call whenever possible. Where the ILEC refuses to make UNE DS-3 or dark fiber transport available to a CLEC on the grounds that the test has been met, the ILEC must identify the carriers whose existence and presence satisfy the test. If the CLEC disagrees that the test has been met, the CLEC may petition the Market Disputes Resolution Division for informal resolution of the issue.

III. Mass Market Definition

A. Triennial Review Order

Integra believes the FCC should distinguish between and among three different classes of customers: Residential (mass market), small to medium sized businesses, defined as businesses with 96 or fewer access lines at any one location, and enterprise customers, businesses with 97 or more access lines at any one location. Integra proposes the FCC find CLECs serving residential and business customers with 96 or fewer access lines at one location are impaired without both DS-0 and DS-1 loops and DS-1, DS-3, and dark fiber transport.

B. Fiber to the home/Fiber to the curb

For FTTH and FTTC issues, Integra proposes that "mass market" be defined as "residential" customers. This definition is consistent with the policy behind these two decisions, i.e. allowing ILECs to compete with cable companies for video services. It is also consistent with the FCC's analysis of these issues. For example, the "H" in FTTH means "home", not "business". When describing the extent of deployment of FTTH in the TRO, the FCC references "26,000" homes", not businesses. TRO par. 227. The FCC's analysis makes sense because residential customers order video, not business customers. This definition also provides the most clarity in the field, greatly minimizing disputes between ILECs and CLECs. Everyone understands what a residential customer is; definitions utilizing numbers of access lines cause confusion. Also, Integra's average business customer has only 8 access lines. This means Integra has many customers with four or fewer lines. Defining "mass market" as four lines or fewer cuts significantly into Integra's customer base, a customer base that the FCC did not intend to impact in making the FTTH and FTTC decisions.

As an alternative, "mass market" could be defined to mean a customer ordering video service. Because only residential customers order video services, this approach achieves the same outcome.

IV. Pricing of 271 network elements

Network elements removed from the 251 list as part of this proceeding might nonetheless be available to requesting carriers as network elements under 271. The FCC has already ordered that RBOCs have an independent obligation to make certain network elements available under 271. The Courts have upheld that decision. To complete the circle, the FCC must decide how 271 network elements will be priced. To date, the FCC has only said that those elements will be priced under the "just and reasonable" standards of sections 201 and 202 of the Communications Act.

The USTA II court noted that the FCC failed to consider the non-discrimination language in section 202. An RBOC may not price 271 network elements in a manner that discriminates against CLEC buyers. This means not only that CLECs must be treated the same, but also how the RBOC seller, who is also a competitor of its buyers, treats itself must be considered. The price charged to requesting carriers cannot be different from the price the RBOC charges itself. Any other outcome is discriminatory.

Integra proposes that the FCC choose an appropriate pricing methodology and leave implementation of that methodology to the state commissions. Integra believes the FCC should choose one of three different methodologies: the prices in effect when the RBOC obtained 271 approval; the pricing methodology in effect when the RBOC obtained 271 approval, TELRIC; or the RBOC may only charge requesting carriers the same cost it currently imputes to itself.

It is important to leave the actual implementation of the pricing methodology to the states. State pricing varies significantly. In some states, even pricing at TELRIC is discriminatory because it results in the requesting carrier paying significantly more for a loop than the RBOC charges itself. Integra offers two specific examples of this dynamic existing today in its own territory (all pricing is from either the Interconnection Agreement or tariffs on file with State Commissions):

Utah: Qwest wholesale loop rate-$**11.63**
Qwest residential retail price-$**11.03**
Qwest residential retail price less costs of switching and channel termination equals Qwest maximum loop cost-$**7.11**

Conclusion: Qwest's loop cost is at least **$4.52** lower than Integra's wholesale loop cost. TELRIC pricing for 271 loops in Utah is discriminatory under 202 of the Communications Act.

Oregon: Qwest wholesale loop rate-$**13.95**
Qwest retail price-$12.80 urban, $14.80 rural
Qwest retail price less costs of switching and channel termination equals Qwest maximum loop costs-$**10.59** urban, $**12.59** rural.

Conclusion: Qwest's loop costs are as much as $3.36 lower than Integra's wholesale loop cost. TELRIC pricing for 271 loops in Oregon is discriminatory under 202 of the Communications Act.

V. Key Findings Supported by Integra's Impairment Analysis

Integra conducted an impairment analysis for both loops and transport. The analysis examined Integra's five state markets, analyzing whether Integra should be required to self-provision loops, self-provision transport, whether a wholesale market exists for loops and transport, and whether special access is an economically viable substitute for unbundled network elements. Integra utilized four basic approaches to gathering data for analysis: first, a survey by an independent company of businesses in Integra's top 5 markets to identify the companies competing with Integra; second, an analysis of the self-provisioning activities of the companies competing with Integra; third, an analysis of Integra's 100 largest customers to determine if they have multiple loops to their premises; lastly, a visual inspection by Integra service representatives of all customer demarcations visited by Integra service representatives over a one week period of time. Here are the key findings of Integra's impairment analysis, supported by data in Integra's Initial and Reply comments in this proceeding:

A. Loops

- ✓ Wireline carriers serve 99% of the small to medium sized business market.
- ✓ 89 of Integra's largest 100 customers, averaging 95 access lines at one location, have only the ILEC loop to their premises.
- ✓ 97 of Integra's 100 largest customers do not have more than one loop in addition to the ILEC loop.
- ✓ 99.99% of Integra's total customer base, averaging 8 access lines, has only the ILEC loop.
- ✓ There is no wholesale market for loops within Integra's five state serving area.
- ✓ Special access pricing increases Integra's monthly loop costs by 220% to 500% .

B. Transport

- ✓ Only the ILEC has transport connecting all of the central offices in which Integra is collocated.
- ✓ The small to medium sized business market is very widespread, with 94% of businesses throughout an ILEC's network being potential Integra customers. Competitors serving this market require transport that covers all end offices that serve businesses. Alternative transport providers have not built networks to serve this market; rather they built networks to serve large, enterprise customers in specific business corridors.
- ✓ Alternative providers connect less than 1% of Integra's potential customers.
- ✓ Seattle: offers more alternative transport than any other Integra market, yet the largest transport provider can only connect 5 of the 12 central offices in which Integra is collocated; cost to Integra of using those 5 connections is 500% per month increase in out of pocket costs plus increased maintenance expense and "daisy chaining" issues.

- ✓ Eliminating dark fiber as a UNE and moving to special access pricing increases Integra's costs by 9,872% per month.

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